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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Revocation of License of	)	PR Docket No. 92-119
	)	
SANDRA V. CRANE	)	
Amateur Radio Station N6TFO	)	
Marina Del Ray, California	)	
	)	
and	)	
	)	
Suspension of License of	)	
	)	
SANDRA V. CRANE	)	
Amateur Extra Class	)	
Radio Operator License	)	
	)	
and	)	
	)	
Revocation of License of	)	
	)	
CHARLES P. PASCAL	)	
Amateur Radio Station WB6CIY	)	
Carson City, Nevada	)	
	)	
and	)	
	)	
Suspension of License of	)	
	)	
CHARLES P. PASCAL	)	
Amateur Extra Class	)	
Radio Operator License	)	

To: Hon. Joseph Chachkin, Administrative Law Judge

REPLY TO ANSWER TO APPLICATION
FOR AWARD UNDER EQUAL ACCESS TO JUSTICE ACT

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Summary

Sandra V. Crane and Charles P. Pascal submit their reply to the Answer filed by the Private Radio Bureau ("Bureau") to their request for award of fees and expenses pursuant to the Equal Access to Justice Act ("EAJA").

As Ms. Crane and Mr. Pascal show herein, the Bureau's arguments against grant of their EAJA application must be rejected.

First, Ms. Crane and Mr. Pascal were prevailing parties under the EAJA. They sought to prevent revocation of their licenses and were successful. That they entered into a consent degree and accepted relatively minor sanctions compared to the Bureau's sought after revocation, does not prevent them from being prevailing parties.

Second, despite its lengthy argument, the Bureau has not shown that it was substantially justified in pursuing revocation against Ms. Crane or Mr. Pascal. On a review of the record as a whole, the determination that the Bureau lacked substantial evidence to support its position is manifest. The Bureau's attempt to reduce the standard of substantial justification to a mere "good faith dispute" is not the standard and should be rejected.

Third, the Bureau's attempt to pick at the cost justification date submitted with the application fails. Ms. Crane and Mr. Pascal have presented sufficient data for the ALJ to verify their expenses.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Revocation of License of SANDRA V. CRANE Amateur Radio Station N6TFO Marina Del Ray, California and Suspension of License of SANDRA V. CRANE Amateur Extra Class Radio Operator License and Revocation of License of CHARLES P. PASCAL Amateur Radio Station WB6CIY Carson City, Nevada and Suspension of License of CHARLES P. PASCAL Amateur Extra Class Radio Operator License	)	PR Docket No. 92-119

To: Hon. Joseph Chachkin, Administrative Law Judge

REPLY TO ANSWER TO APPLICATION
FOR AWARD UNDER EQUAL ACCESS TO JUSTICE ACT

Sandra V. Crane and Charles P. Pascal, by their counsel and pursuant to Commission Rule Section 1.1523 reply to the Private Radio Bureau's ("Bureau") answer to their application for award of fees and costs pursuant to the Equal Access to Justice Act, 5 U.S.C. Section 504 ("EAJA"). In support, the following is shown:

1. On November 4, 1992, Ms. Crane and Mr. Pascal applied for an award of fees and costs in the above referenced proceeding, pursuant to the EAJA. On December 4, 1992, the

Bureau submitted its answer opposing the request.[1/] The Bureau's pleading in opposition asserts that Ms. Crane's and Mr. Pascal's application should be denied or reduced for three reasons. First, the Bureau suggests that Ms. Crane and Mr. Pascal did not substantially prevail in this proceeding. Second, the Bureau asserts that its position was substantially justified. Third, the Bureau argues there are inadequacies in counsel's showing of fees and expenses. As shown below, these three arguments of the Bureau's are without merit. Ms. Crane and Mr. Pascal should be given the limited recompense the law provides for the tremendous financial hardship they shouldered to prevent the injustice to them of revocation of their amateur radio licenses had they not stood fast to litigate this case.

I. Introduction.

2. Congress enacted the EAJA in an attempt to better balance the disparity in resources between the government on one hand and private individuals and small business on the other so as to encourage those latter entities to resist arbitrary or overreaching government action. See Grand Blvd. Imp. Ass'n v. City of Chicago, 553 F. Supp. 1154 (D.C. Ill. 1982). Although not stated as such, the essence of the Bureau's claim here is that Ms. Crane and Mr. Pascal ought not to receive an EAJA award in this case is because the government got something out of setting its proceeding against them, and because they (the Bureau

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1/ Although styled as a reply, Ms. Crane and Mr. Pascal assume the Bureau intended to file an Answer as provided in Rule Section 1.1522.

claims) admitted to a violation each of the rules. Thus, despite that at no time did the Bureau ever submit substantial evidence of fraudulent conduct on the part of either Ms. Crane or Mr. Pascal, the Bureau argues they cannot be considered to be prevailing parties where the government pressed them for revocation of their licenses, based on a claim of fraudulent conduct, even where the government eventually abandoned that claim for lack of support. Ms. Crane and Mr. Pascal submit the Bureau's argument turns the purposes of the EAJA, and the statute itself, on its head.

3. The EAJA's purpose was to help assure that when the government acts against the citizenry, it should act not merely to win a contested proceeding, but that it should see that the ends of justice are served. See Pierce v. Underwood, 487 U.S. 552, 556, 557 (1988) (Brennan, J. concurring); Miles v. Bowen, 632 F. Supp. 282 (M.D. Ala. 1986); The Bureau's conduct in this case fell far short of that standard. The Bureau pressed this case without critical evaluation of the evidence it intended to present, and either ignored substantial evidence in its possession indicating that the allegations it pressed in this proceeding were unfounded, or that the witnesses and other persons upon which it was relying, were themselves unreliable.

4. This became clear in the prehearing proceedings conducted in anticipation of the hearing in this case. Time and again the administrative law judge obtained concessions from the Bureau that it lacked "direct" evidence of its allegations, and

time and again the administrative law judge indicated that the "inferences" upon which the Bureau was reduced to relying, lacked support from its case in chief. During those prehearing proceedings the Presiding Officer repeatedly emphasized that he expected the Bureau to produce the testimony of the person who was responsible for initiating this proceeding against the respondents, Mr. David Morse, and time and again the Bureau balked at doing so. Only after the revelation that this individual, who had set this case in motion, had apparently suborned perjury of another in an attempt to avoid testifying, did the Bureau, its case having completely crumbled, agree to a settlement which prevented the necessity for Ms. Crane and Mr. Pascal to spend tens of thousands of more dollars to complete the hearing which never should have been designated in the first place. If any case cries out for an award under the EAJA, this one does.

II. **Ms. Crane and Mr. Pascal substantially prevailed in this proceeding.**

5. The Bureau's first line of defense against compensating Ms. Crane and Mr. Pascal for the expense to which it put them to save their amateur licenses is the argument that Ms. Crane and Mr. Pascal did not prevail in this proceeding.[2/] The Bureau's

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2/ The Bureau also tags along a throwaway argument (at 9-10) that Ms. Crane's and Mr. Pascal's EAJA application is defective (and should be dismissed with no right of remedy) because the application only spends five sentences showing that Ms. Crane and Mr. Pascal prevailed. Suffice it to say first that the Bureau cites no case requiring any specific degree of detail in making the showing that a party is a (continued...)

argument here is that because the Bureau got by way of settlement some of what it wanted in initiating the case, then Ms. Crane and Mr. Pascal did not prevail. The Bureau is wrong because the EAJA looks not at what the government got by way of litigation, but at what the litigant against the government achieved.

6. The decisions of the courts are clear that it is well established that a litigant against the government need not obtain a formal judgment on the merits to qualify as a "prevailing party" under the EAJA; rather, it is sufficient that the litigant's participation in the litigation has served as a catalyst in prompting the achievement of the litigant's desired result, or at least part of it. See Citizens Coal. for Block Grant v. City of Euclid, 717 F.2d 964, 966 (6th Cir. 1983). As the Eighth Circuit explained, "The EAJA standard is not stringent; 'a [party must] receive at least some of relief on

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2/(...continued)
prevailing one. Indeed, the Bureau's own cited case, Dunn v. U.S., 842 F.2d 1420, 1434 (3d Cir. 1988), found the Court of Appeals accepting a conclusory finding from the district court that a party prevailed, and remanding the proceeding so that the requesting party could make a more complete showing on another point. The other cases the Bureau cites in this discussion, concerning the entire failure to make a showing as to net worth (United States v. Hopkins Dodge Sales, Inc., 707 F. Supp. 1078, 1080 (D. Minn. 1989)) or to file the application on time (Columbia Manufacturing Corp. v. NLRB, 715 F.2d 1409 (9th Cir. 1983)), simply do not stand for the proposition the Bureau urges.

Second, it simply does not take more than five sentences to state the obvious in this case. The Bureau issued a show cause order seeking revocation. Ms. Crane and Mr. Pascal opposed revocation. Ms. Crane and Mr. Pascal still have their licenses. Thus, they prevailed. And if there is any doubt on this point, the textual discussion below should resolve it.

the merits of his claim....' to be a prevailing party." SEC v. Conserv Corp., 908 F.2d 1407, 1412 (8th Cir. 1990). See also Continental Web. Press, Inc. v. NLRB, 767 F.2d 321 (7th Cir. 1985); Nash v. Sullivan, 733 F. Supp. 10 (W.D.N.Y. 1990) (Party "prevails" for purposes of EAJA if it succeeds on significant issue which achieves some of benefit sought in litigation).

7. Moreover, expressly contrary to the Bureau's argument (at 6-9), an award of fees is appropriate following settlement of litigation. See Pierce v. Underwood, 487 U.S. at 554 (Supreme Court sustained award of fees under EAJA following settlement with government, although disagreed with lower court's method of calculation); Maher v. Gagne, 446 U.S. 122, 129 (1980) (claim to fees not weakened following favorable settlement rather than litigation).[3/] Thus, to the extent the Bureau implies that a settlement of litigation vitiates a claim that the party opposing the government prevailed, these cases show that the Bureau is just plain wrong. See also Dubose v. Pierce, 857 F.2d 889 (2d Cir. 1985), cert. den. 490 U.S. 1007; Achaval-Biano v. Gustafson, 736 F. Supp. 214 (C.D. Cal. 1989); Garcia v. Bowen, 702 F. Supp. 409 (S.D.N.Y. 1988).

3/ The Bureau's citation to SEC v. Conserv Corp., 908 F.2d 1407, which this reply cites above, to support the Bureau's argument that Ms. Crane and Mr. Pascal did not prevail in this case because they entered into a settlement is misleading and inapposite. In that case, Conserv neither contested the requested injunction nor any other relief the government sought against it; neither did Conserv seek an award of fees under the EAJA. Thus, there was no settlement of that proceeding itself as to Conserv, nor was there any decision on an EAJA award sought after settlement.

8. In this case, the Bureau sought revocation of Ms. Crane's and Mr. Pascal's amateur licenses on the basis that Ms. Crane and Mr. Pascal allegedly attempted to assist persons to obtain amateur licenses by fraudulent means. As a result of Ms. Crane's and Mr. Pascal's vigorous defense of the revocation proceeding, the government abandoned revocation, albeit not before Ms. Crane and Mr. Pascal incurred attorneys' fees in excess of $41,000. See EAJA Application at para. 3. Given these circumstances, it cannot be seriously disputed that Ms. Crane and Mr. Pascal prevailed against the Bureau's attempt to revoke their licenses. That clearly makes Ms. Crane and Mr. Pascal prevailing parties under the EAJA's standard since they received at least some of the relief they sought in contesting the Bureau's Show Cause Order. That they eventually agreed as of the end of September, 1992 to a three month suspension, retroactive to August 1, 1992, slightly over 30 days of effective suspension, and that they agreed that any testing they would have done in the future with respect to any school they might operate, would be through the ARRL, are both minor items compared to the Bureau's attempt to impose the death penalty on their licenses.

9. It was just this type of overreaching behavior the EAJA was designed to present. Although as part of the consent order entered in this case the Bureau and Ms. Crane and Mr. Pascal agreed that there would be no finding of a rule violation, Ms. Crane and Mr. Pascal never contested that they may have each committed -- although we do not concede that either did commit--

a minor violation of the rules. And they never contested the propriety of some minimal sanction. What they did contest successfully was the Bureau's attempt to revoke their licenses altogether. Ms. Crane and Mr. Pascal undoubtedly prevailed against the Bureau on this contested aspect of the litigation, and that is more than sufficient to qualify them as "prevailing parties" under the EAJA.[4/]

III. The Bureau's position advocating revocation of license was not substantially justified.

10. Having demonstrated that the Bureau is incorrect in its assertion that Ms. Crane and Mr. Pascal were not prevailing parties, this reply turns to the Bureau's more substantive--though still erroneous--contention that its position was substantially justified.

11. Preliminarily, Ms. Crane and Mr. Pascal note their general -- albeit far from total -- agreement with the Bureau's discussion of the applicable standard.[5/] That standard, as

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4/ As Judge Posner of the Seventh Circuit aptly explained in his Continental Web Press opinion, a party prevails for the purpose of the EAJA if he wins a substantial part of what he sought. He does not have to win everything he sought; after all the average winning party does not. 767 F.2d at 323. In this case, Ms. Crane and Mr. Pascal sought to keep their amateur licenses. They succeeded.

5/ Ms. Crane and Mr. Pascal do dispute the Bureau's suggestion that a position may be substantially justified even if it is incorrect. While from an academic standpoint this is undoubtedly true, it does not flow from that point that all incorrect positions are substantially justified just because the government chooses to advance them. In addition, that material facts may have been in dispute, is certainly not sufficient to deny an EAJA award. Indeed, Justice Scalia's opinion for the Court was careful to point out that the

(continued...)

explained by the Supreme Court in Pierce v. Underwood, 487 U.S. 552, requires the government to show that its position was justified in the main, that is, that the position has a reasonable basis in law and fact. Id. at 565-66 & n. 2.6/

12. Turning to the specific facts at issue in this proceeding, the Bureau argues first that so-called undisputed facts, by themselves, justified its attempt to revoke Ms. Crane's and Mr. Pascal's licenses, and the conclusion that the Bureau was substantially justified is even more evident considering so-called "disputed" matters. Ms. Crane and Mr. Pascal will address both those arguments shortly.

13. The first problem with the Bureau's argument is that it assumes that if the Bureau had one factual predicate which was meritorious that this justified the Bureau's position even if based on the record as a whole its position was not justified. This is simply not what the EAJA or the Commission's rules

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5/ (...continued)
appropriate standard is similar to the substantial evidence standard. By contrast, a standard like that advanced by the Bureau is more akin to the standard for denial of a summary judgement motion under FRCP 56 (or FCC Rule Section 1.251) or a motion for directed verdict under FRCP 50.

6/ That standard is not, however, a lax one as the Court made clear in stating:

> To be "substantially justified" means, of course, more than merely undeserving of sanctions for frivolousness; that is assuredly not the standard for Government litigation of which a reasonable person would approve.

Id. at 566. This is especially true considering that the statute requires the government to shoulder the burden to demonstrate that its position was substantially justified.

implementing the statute provide. Rule Section 1.1526 is clear on its face that the decision

> Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.

The significance of that provision is important in two respects. First, it makes it clear that the Presiding Officer is limited in making his decision solely to the record already developed in the proceeding, and that supplemental affidavit or other showings are not permissible on this issue.[7/] Second, that decision must be made on the basis of the record and the proceeding as a whole. Thus, it is insufficient for the Bureau to seek to show that its position was substantially justified by justifying merely one or two of its positions. Rather, it must show that in the main its position in the litigation was justified. Merely citing one or two minor matters, the basic facts of which Ms. Crane and Mr. Pascal never really contested, can hardly serve as a basis to indicate that the bulk of the Bureau's position in this litigation was justified.[8/]

7/ To that end, the Presiding Officer may not rely for his determination of whether the Bureau's position was substantially justified on the various additional non-record materials submitted with the Bureau's Answer. Significantly, these materials are tendered by the Bureau to discuss what "could have been elicited if this matter had gone to hearing." Answer at 15 n. 21. The Bureau's attempt at this late stage to bolster its case on this question with material never previously exchanged simply cannot be considered.

8/ This is important because the Bureau could, and did here, put Ms. Crane and Mr. Pascal to inordinate expense con-

(continued...)

14. Second, the Bureau's position in support of revocation of license was simply not justified by reference to so-called undisputed facts. In that connection, the Bureau's two alleged "undisputed" incidents concern (1) the Morse Code test given on August 4, 1991, and (2) Sandra Crane's having acted as one of the volunteer examiners ("VE") for certain of the amateur examinations taken by her daughter. Neither of these matters justified the Bureau's seeking to revoke Ms. Crane's and Mr. Pascal's licenses.

15. With respect to the allegation that Mr. Pascal improperly administered the August 4, 1991 Morse Code examination, it is important to recognize what did and what did not occur, and what was and was not disputed. The unrebutted evidence tendered showed that Mr. Pascal was teaching a no-code technician's class. At lunch he taught a "teaser" code class in which he taught a couple of sentences, the numbers and some miscellaneous letters and symbols. Later, after the VEs arrived to begin testing for that class, a few of the students asked to take the Novice Morse Code examination. Since only a technician examination was scheduled, the VEs had not brought a code tape. Mr. Pascal was accordingly requested by the chief VE, Mr. Pierce, to send the Morse Code test on a keyboard he had with him. Right

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8/ (...continued)
testing matters as to which it ultimately lacked substantial proof. Again, it is as much to government overreaching in litigation that the EAJA is addressed, as to the ultimate result.

before he sent the test, he remarked to the class that he would send one of the sentences taught earlier.9/

16. Although prudence would require the admission that Mr. Pascal's gratuitous statement was inappropriate, it simply did not violate Rule Section 97.17(e), and it certainly could not by any reasonable person be considered to constitute such an egregious violation of that rule as to support by itself revocation of license. This rule subsection speaks in terms of assisting others to obtain amateur licenses by fraudulent means. Even looking at the matter in the light most favorable to the Bureau, Mr. Pascal technically did not violate that or any other rule. Rule Section 97.507(e) provides that "no message known to the examinee may be administered in a telegraph examination." Although Mr. Pascal was never accused of violating this section, it appears that this is what the Division meant by its allegation of fraud. However, neither this rule, nor any other, as a matter of law was violated in the exam session held on August 4, 1991. Mr. Pascal delivered a Morse Code test at the request of and under the direction of three independent VEs. He specifically did not compromise the examination: He did not divulge in advance the contents of the test.

9/ The only dispute in the evidence is whether Mr. Pascal made this remark during the lunchtime teaser session or immediately prior to sending the code. Compare Written Testimony of Charles Pascal, Lance Ferrante, Terence Pierce and Sandra Crane with Written Testimony of Christine McElwain.

17. Had Mr. Pascal told the class which sentence he was going to give them, perhaps that would have been a compromised test because the students would have known the message which was to be sent. Telling them that they would get one of two messages, simply is not a violation of the rules. It is unfair and unjust to take punitive action against persons where the rules on their face are not clear enough to warn as to what is the behavior which the Commission intends to prohibit. And it is certainly unreasonable to consider that such a vaguely worded rule could serve, standing alone as the Bureau asserts, as substantial justification for a request to revoke a license.

18. With respect to the matter of Ms. Crane, the facts are even more against the Bureau's position. In Ms. Crane's and Mr. Pascal's EAJA application, undersigned counsel pointed out that a prior incident of a relative acting as a VE resulted in only a $500 forfeiture. In the Bureau's Answer, however, the Bureau appears to dispute this fact by asserting it could not find any case in which a forfeiture was imposed for violation of Section 97.515(d), but in any event the Bureau has discretion to seek revocation of an amateur license, rather than "a substantial monetary forfeiture on an individual licensee." During the prehearing conference undersigned counsel made the identical representation. At Transcript pages 382-83, the following exchange occurred:

> JUDGE CHACHKIN: [Addressing the Bureau] Isn't that a bearing, the fact that apparently this provision seems to be overlooked or forgotten by qualified VEs including Mr. Sfair, at the time of the event, doesn't

> that have a bearing on the seriousness of the offense and how it should be treated in terms of whether it justified the sanction that the bureau is seeking here?
>
> MR. LYON: Indeed in an analogous case, Your Honor, the bureau merely imposed a $500 fine on someone who VE'd a relative. I can't cite you the document, but it was supplied in the course of the FOIA action by the bureau.
>
> JUDGE CHACHKIN: Is that true, counsel?
>
> MR. FITZ-GIBBON: I don't have it in front of me, but I think that is probably correct.
>
> JUDGE CHACHKIN: So if the only evidence in this case, as far as Ms. Crane is concerned, reveals that she made this mistake about her daughter, would the bureau still be inclined to seek the revocation of her license.
>
> MR. FITZ-GIBBON: Probably that alone would not form the basis for a revocation proceeding, Your Honor.

Given the Bureau's concessions on the record of this proceeding set forth above, its claim now that the alleged violation of Section 97.515(d), standing alone, justified it in seeking revocation of Ms. Crane's license borders on bad faith, and certainly does not in any way support a claim of substantial justification of the Bureau's position in this regard.10/

10/ With respect to this matter, Ms. Crane, readily admitted in her answers to interrogatories and in her exchanged written testimony that she participated as a VE with respect to examinations conducted of her daughter, although she nevertheless asserted her good faith in doing so. Despite this admitted violation, at no point did the Bureau ever tender any evidence to indicate that the examinations given her daughter had been compromised in any way by that rule violation. To support revocation for that rule violation, such evidence would, at a minimum have had to indicate some fraudulent intent, see Vincent J. Beard, 57 Rad. Reg. 2d (P&F) 96 (Rev. Bd. 1984), or culpable concealment, see Blue Ribbon Broadcasting, Inc., 51 Rad. Reg. 2d (P&F) 1474 (Rev. Bd. 1982). See also Silver Star Communications - Albany, 70 Rad. Reg. 2d (P&F) 18 (1991) (violation of unauthorized

(continued...)

19. Moreover, despite having not a wit of evidence to suggest that Mr. Pascal had any knowledge of the matter at the time it occurred, and having tendered no evidence on the subject at the time of exhibit exchange, the Bureau specified an issue (Issue _) as to Mr. Pascal's complicity in regard to Ms. Crane's having VE'd her daughter. Given the Bureau's complete lack of evidence on this issue and that the Bureau has not even tried to justify specifying this issue, surely the Bureau has failed to show that its specification of this issue was substantially justified.11/

20. The Bureau's contentions that "disputed facts" further support its attempt to revoke Ms. Crane's and Mr. Pascal's licenses is no more convincing. First, much of the discussion presented is based upon new materials submitted in the Answer, rather than on evidence in the record of the revocation proceeding. See, e.g., Answer at 16. Pursuant to Section 1.1526, the Presiding Officer is foreclosed from considering any

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10/ (...continued)
transfer of control rule, by itself is not grounds for revocation). Accord MCI Telecommunications Corp., 64 Rad. Reg. 2d (P&F) 672 (1988) (violation of premature construction rule).

11/ The Bureau mischaracterizes the record in regard to this matter by asserting that Pascal administered the Morse Code test. That is false and the Bureau knows it. As the Bureau well knows three VEs were present and administered the examinations given on August 4, 1991. Indeed, the Bureau issued Notices of Apparent Liability to each of those VEs for, inter alia, administering compromised exams. To ignore its own action and assert that Mr. Pascal administered the exams merely because he keyed the Morse Code again borders on bad faith.

of that new material in making a decision that the Bureau's position in the litigation was substantially justified.

21. In any event, the Bureau's discussion still fails to present substantial justification. The matter of the Morse Code test on August 4, 1991, was discussed above. The disputed testimony of Ms. McElwain, even if it were believable in light of the considerable material submitted by the respondents disputing her testimony, simply does not, for the reasons discussed above, establish a violation of the rules, much less the Bureau's claimed fraudulent intent.[12/] For the same reason, the claim that the Morse Code test given on September 14, 1991, was fraudulent is lacking in substance.[13/]

12/ Strangely, the Bureau implies that Mr. Pascal violated some rule or was otherwise at fault on August 4, 1991 because he taught only part of the Morse Code alphabet during his code teaser class. See Answer at 17 & n. 22. Yet, the Bureau itself admitted during hearing that it had no jurisdiction over, and that the rules are silent with respect to, the teaching of courses to prepare students for amateur examinations.

13/ Indeed, despite the discussion at pages 20-21 of the Bureau's Answer, the sole claim with respect to the alleged fraudulent nature of the Morse Code examination that day is that the test Ms. McElwain was administered, contained material which was close -- but not identical -- to the two sentences taught her on August 4, 1991. See Answer at 20. To this end the Bureau is reduced to arguing that the content of the second tape and the disputed assertion that Sandra Crane had possession of that tape prior to the class, constituted "prima facie" evidence that Ms. Crane and Mr. Pascal, in violation of Section 97.17(e) arranged for [Ms.] McElwain to take a Morse Code test whose content Pascal had revealed in advance.

The obvious problem with that argument is that Ms. McElwain, the Bureau's own adopted undercover operative, never stated that Mr. Pascal or anyone else tipped her off that the test she took on September 14, 1991, would be that which she

(continued...)

22. Moreover, the Bureau's position with respect to the written test sessions of August 4, 1991 and August 24, 1991, likewise is without substantial justification. The inference of fraud the Bureau sought to have the presiding officer draw was based on a tenuous argument which lacked substantial evidence to support it. In essence, the Bureau's case for fraud here is based on the allegation of Ms. McElwain that the review sessions and handouts provided her covered less than 50 percent of the question pool, but provided sufficient information to pass the examinations given her. Ms. McElwain made those claims lacking a copy of the element 2 test she took on August 4, 1991, which the Bureau did not she fit to obtain and place in evidence, see Tr. 188-96 -- and on the basis of only nine sparse pages of notes she took on that date.[14/] She made these claims having not attended

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13/ (...continued)
took. If fraud has been on Ms. Crane's or Mr. Pascal's mind, wouldn't they have tipped Ms. McElwain in advance as to the content of the September 14, 1991 test prior to the testing session? That they did not is telling evidence that they was no proof of fraud, as to the test that day, even accepting as true every factual representation contained in the Bureau's case in chief, which is expressly not the test for the "substantial justification" standard.

14/ As the Presiding Officer observed on the record with respect to those "notes," and the reliance thereon by the Bureau's proposed expert witness, Mr. Ramsey, whose testimony was rejected:

> JUDGE CHACHKIN: You know, even four hours with nine pages, which suggests that she didn't take down word for word what he said, so he doesn't even have, in order to make his hypothetical opinion, he doesn't have the benefit even of a complete report of exactly what took place, only notes, which admittedly clearly are not word for
> (continued...)

the full class session on August 24, 1991, Tr. at 211, nor taking into account the fact that there was a second edition of each of the two elements of the examination which she took on that date, Tr. 217.15/

14/(...continued)
word.

* * *

That's something which took place over four hours. Clearly it was not complete on its face. That's apparent.

Tr. 310-11.

15/ Indeed, it appeared at hearing that the Bureau made no effort to obtain these examinations from the VEs who administered them:

MR. LYON: The Bureau also from what I'm hearing, hasn't made ... any attempt to obtain these [tests] from the VEs who administered them, and I think that's a major hole in the Bureau's case. They just can't not attempt to get something and say ["]we don't have it.["] I think that efforts should have been made to obtain them from the VEs themselves.

JUDGE CHACHKIN: We'll there is precedent, and there's presumption that the Bureau does not put in evidence material which would be favorable to the Respondent, and the presumption is that they didn't do so because it was favorable.

MR. FITZ-GIBBON: We simply don't have them.

JUDGE CHACHKIN: ... I can't conceive of any other reason why the Bureau is not putting it in.

MR. FITZ-GIBBON: Your Honor, we don't have copies of those exams.

JUDGE CHACHKIN: But apparently it is available, and the Bureau apparently has not made any attempt to obtain those materials.

(continued...)

23. Given these, and other, infirmities in Ms. McElwain's testimony, the Presiding Officer remarked on the record:

> JUDGE CHACHKIN: But it would seem to me that still the Bureau has the difficulty which apparently they have no evidence of establishing that Mr. Pascal in fact had the exam questions prior to the time he gave the test, prior to the time the test was administered, not by Pascal, but by the VEs. Apparently you have no evidence of that....
>
> Well, in the absence of any evidence that he had a copy of the exact test to be given, then the Bureau will have difficulty proving that he somehow only taught the questions, but that's up to the Bureau to prove.

Tr. 220-21.

24. To somehow raise an inference that Mr. Pascal had the examinations ahead of time, the only evidence the Bureau can point to is testimony from Ms. McElwain to the effect that when she took the second review class on August 24, 1991, Sandra Crane

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15/(...continued)

> MR. FITZ-GIBBON: ... We did not ask the Volunteer Examiners, because we did not expect them to be cooperative.
>
> * * *
>
> JUDGE CHACHKIN: And you have not checked with any of the volunteer examiners as to whether or not they kept any of them?
>
> MR. FITZ-GIBBON: No we haven't.
>
> JUDGE CHACHKIN: Is there any reason why you didn't?
>
> MR. FITZ-GIBBON: Because we thought there was very little chance of getting them, and for strategic reasons we did not want to contact the Volunteer Examiners.

Tr. 279-82. Apparently strategic advantage was more important to the Bureau than the development of a full record.

had copies of three "tests" in front of her, that she said she just got the tests last night, and that these tests were used to review the students. To the Bureau all this "strongly suggests" that the papers Ms. Crane had in front of her were the tests which were actually administered, or there would be no reason to place such heavy emphasis on them in the review. Answer at 19. Despite the Bureau's assertion that these facts establish at least a bona fide dispute as to which reasonable men could differ, see id., all the Bureau's "position" amounts to gross speculation, unsupported by any evidence. That is especially true given that four different written tests, not three, were used on August 24, 1991.

25. In fact, during the prehearing proceedings, the Bureau all but admitted that it had no evidence that Mr. Pascal had been tipped off by the VEs concerning what tests they would use, and it was unable to respond to the Presiding Officer's inquiry as to what critical review the Bureau had undertaken of its case.

> MR. MALINEN: ... no one admitted to having given Pascal or anyone else the exams ahead of time.
>
> We could, of course, [have] deposed all of those people, hoping to find somebody to admit to that and perhaps brought them out here, but we expected as a matter of strategy that that would have been a waste of time and money and so we don't have a [VE] who will testify that he or she handed off the exam questions, tipped off Mr. Pascal and Ms. Crane ahead of time.
>
> JUDGE CHACHKIN: Well, if you don't have that, the question is why did you cite such an issue against Mr. Pascal if you didn't have the evidence?
>
> MR. MALINEN: Because we intended to prove that it was not possible that things could be otherwise. Even if we did not show, could not prove the chain of custody

of examinations entirely, we could prove that given the requirements of having knowledge before you take an examination and the circumstances we could prove that somehow those students, maybe unbeknownst to them, were sitting through training that could only have been designed if the instructor know what was going to be on the exam, not just in a generalized fashion, but in a precise fashion.

* * *

JUDGE CHACHKIN: Well, that's your supposition. You know in a court of law, you have to have some facts, you have to have evidence. If you don't have evidence, you don't bring charges against someone.

MR. MALINEN: It is inference evidence, Your Honor--

JUDGE CHACHKIN: It is not even inference. There is no inference evidence. What inference is it?

* * *

In the first place, as I gather, the charges were brought by two individuals who had been fired from the school. That is the only basis for bringing the complaints, am I wrong or right? Did anyone else complain about the school, about Mr. Pascal other than Mr. Sfair and Mr. Ordway? Were there any other complaints against them?

* * *

And not only that but Mr. Sfair and Mr. Ordway both worked apparently [with] Mr. Pascal and Ms. Crane over what period of time?

* * *

But neither one of them has come forward as a witness to testify that there was any improprieties when they were working with Mr. Pascal, doesn't that seem strange? Not one of them. It would seem to me that they were in there working with Mr. Pascal and Ms. Crane, and if anyone knew about any improprieties, tipping, or getting answers to test results, it would be they.

* * *

[B]ut as far as giving or having test questions in advance, isn't it strange that both of them worked

> there but yet neither one of them has filed--although they made a complaint against Ms. Crane and Mr. Pascal, neither one of them has come forward with any evidence.
>
> Doesn't that concern the bureau that neither one of them has any evidence despite the fact that they have been working there, that they were working there? Doesn't it also concern the bureau that not a single applicant of all the years that Mr. Pascal was there filed any complaints of this nature? Doesn't it also concern the bureau that a VE who supervised these exams over all of these years has never filed a complaint, that never claimed there were any improprieties?
>
> Doesn't any of these matters concern the bureau in evaluating the basis of these charges?

Tr. 350-55. Unfortunately, the Bureau's Answer remains silent on these very salient questions the Presiding Officer put to Bureau counsel. In the absence of an answer to these questions, it does not seem possible that the Bureau could have met its burden to prove that its position in this litigation was substantially justified.

26. Ultimately, of course, the Bureau's case came down to Ms. McElwain's word (and supposition based upon it) against everyone else's. The definition of substantial evidence -- which was the Supreme Court's closest analogy in Pierce to the "substantially justified" standard, is evidence on which a reasonable person would base a decision. Ms. Crane and Mr. Pascal suggest that considering the various weaknesses of Ms. McElwain's testimony, and the required supposition required to accept it, and balanced against the overwhelming weight of the testimony available to the Bureau from other students, from VEs and even from the former coworkers of Ms. Crane's and Mr. Pascal's school, none of whom came forward to support Ms.